

MT LEGISLATIVE HISTORY

Chapter 689 19 83

Bill H _____ S 170

Original bill & hist. / C

H. Committee on Jud.

S. Committee on St. Admin.

Hearing Date(s) 3-9 _____ C

Hearing Date(s) 1-25 _____ C

3-14 _____ C

2-4 _____ C

_____ C

_____ C

_____ C

_____ C

Date Out _____ C

_____ C

Y2Yt 3-14

Y2Yt 2-4

Did this bill originate in an interim committee? ____ Yes ____ No

Committee _____

Report _____

-End-

INTRODUCED BILL
SB 170

SENATE BILL NO. 170

INTRODUCED BY BOYLAN

IN THE SENATE

January 17, 1983	Introduced and referred to Committee on State Administration.
February 8, 1983	Committee recommend bill do pass as amended. Report adopted.
February 9, 1983	Bill printed and placed on members' desks.
February 10, 1983	Second reading, pass consideration.
February 11, 1983	On motion, taken from second reading and rereferred to Committee on Judiciary.
February 21, 1983	Committee recommend that bill be printed and placed on second reading.
February 22, 1983	Second reading, do pass as amended. Correctly engrossed.
February 23, 1983	Third reading, passed. Ayes, 49; Noes, 0. Transmitted to House.

IN THE HOUSE

February 28, 1983	Introduced and referred to Committee on Judiciary.
March 15, 1983	Committee recommend bill be concurred in as amended. Report adopted.

March 22, 1983	Second reading, concurred in.
March 23, 1983	Third reading, concurred in.

IN THE SENATE

March 24, 1983	Returned to Senate with amendments.
April 7, 1983	Second reading, amendments not concurred in. Ayes, 44; Noes, 0.
April 8, 1983	On motion, Conference Committee requested and appointed.
April 14, 1983	Conference Committee dissolved.
	On motion, Free Conference Committee requested.
April 15, 1983	Free Conference Committee appointed.
April 20, 1983	Free Conference Committee reported.
April 21, 1983	Second reading, Free Conference Committee report adopted.
	On motion, taken from third reading and returned to second reading.
	On motion, new Free Conference Committee requested, appointed, and reported.
	Second reading, new Free Conference Committee report adopted.
	Third reading, new Free Conference Committee report adopted.

April 21, 1983

New Free Conference Committee
report adopted by House.

Sent to enrolling.

Reported correctly enrolled.

Senate BILL NO. 170
Boyle

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT ELIMINATING THE RIGHT
OF FIRST REFUSAL OF THE FORMER OWNER OF A REAL PROPERTY
INTEREST ACQUIRED FOR A PUBLIC USE AND LATER ABANDONED;
REPEALING SECTIONS 70-30-321 AND 70-30-322, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Repealer. Sections 70-30-321 and 70-30-322,
MCA, are repealed.

-End-

INTRODUCED BILL

SB 170

COMMITTEE ON STATE ADMINISTRATION

Pg 3 BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CON- CURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CON- CURRED IN DATE
SB 157	1/14/83	1/19/83	1/19/83						
SB 166	1/22/83	1/27/83		2/11/83					
SB 170	1/17/83	1/25/83				2/4/83			
SB 171	1/17/83	2/2/83		2/14/83					
SB 171	2/17/83								
SB 181	1/18/83	1/25/83				1/28/83			
SB 190	1/18/83	2/15/83		2/16/83					
SB 205	1/19/83	1/25/83		1/26/83					
SB 211	1/19/83	1/26/83			2/4/83				
SB 216	1/19/83	1/26/83		1/26/83					
SB 217	1/19/83	1/26/83		1/26/83					
SB 230	1/20/83	1/27/83				1/28/83			
SB 235	1/20/83	1/27/83				1/28/83			
SB 246	1/21/83		1/24/83						
SB 258	1/22/83	1/27/83				1/28/83			
SB 259	1/22/83	1/27/83	1/27/83						

Use a separate sheet for Senate, House Bills, and Resolutions.

Chairman Story closed the meeting on S.B. 181.

SENATE BILL 170: AN ACT ELIMINATING THE RIGHT OF FIRST REFUSAL OF THE FORMER OWNER OF A REAL PROPERTY INTEREST ACQUIRED FOR A PUBLIC USE AND LATER ABANDONED; REPEALING SECTIONS 70-30-321 and 70-30-322, MCA."

SENATOR BOYLAN, District #30, presented this bill to the committee. He furnished the committee members with a copy of a brief in support of this bill. (Exhibit 2) He advised that the bill was a repealer of a bill passed in the last session.

PAT UNDERWOOD, Montana Farm Bureau, supports this bill. Montana Farm Bureau members were concerned over the legislation that passed last session. This eminent domain repealer would help. When the property is condemned and not needed it should revert to the landowner or whoever had the deed, not to the highest bidder.

TIM STEARNS, Northern Plains Resource Council, supports this bill. A copy of his written statement is attached as Exhibit 3. He also proposed an amendment to this bill which is attached as Exhibit 4.

Chairman Story asked for opponents. There were no opponents. He then asked for questions from the committee.

Senator Story asked how it was determined when the Highway Department quits using the land.

Senator Boylan said the Highway Department sometimes buys large blocks of land, not just necessarily the right of way. If you check through the records of the Highway Department you will find a lot of land that is not being used.

Senator Story asked how you get the Highway Department to declare that the land is not used. Why would they turn it back if they can't sell it?

Senator Boylan said the bill does not relate to that. If they should decide to sell it would give the original landowner a way to get the land back. If the Milwaukee railroad is abandoning the right of way, the land will not be sold to the highest bidder but will go back to the original owner.

Senator Story pointed out that this only solves one problem, that being if the land should come up for sale.

Senator Towe asked who the chief sponsor of the bill was last session.

Tim Stearns from the Northern Plains Council said the bill was SB 287 and the sponsors were Manley, Conroy, Graham and Galt.

Senator Towe suggested to the committee that there may be a need for matched bids. If you are a farmer and the Highway Department bargains with you for your property and you give them a deed, the laws would not apply. There might be some merit in allowing you a preference bid in that situation.

Senator Marbut referred to Sections 60-2-107 and 60-4-208 of the Montana Code. He stated abandonment is covered in various places but that abandonment is a separate issue.

Senator Stimatz stated that the State Highway Department usually pays good money for land they have condemned. He feels there should be an adjustment for the purchase price. The original owner received the money.

Chairman Story is not satisfied that the bill covers all that was intended. He appointed a subcommittee to review the bill, Senator Marbut and Senator Towe.

SENATE BILL 29: The hearing was opened to S.B. 29, "AN ACT TO REMOVE THE TRANSPORTATION OF GARBAGE FROM THE REGULATORY AUTHORITY OF THE PUBLIC SERVICE COMMISSION; ABOLISHING THE CLASS D MOTOR CARRIER CLASSIFICATION; AMENDING . . ."

SENATOR DOVER, District #24, sponsored this bill and explained the problems that this bill would alleviate in Lewistown. A copy of his written testimony is attached as Exhibit 5.

Chairman Story commented that this bill will remain in committee until at least February 18th, when the bill can be reviewed with the House Bills which pertain to the same subject.

WAYNE BUDT, Public Service Commission, would like to go on record in support of this bill. However, he would urge that the committee hold this bill until HB 73 can be transferred.

DONN PENNELL, Lewistown, supports this bill. He feels the situation now is license without regulation. With competition everything works out reasonably and fair.

MIKE STEPHENS, Montana Association of Counties, supports all three bills, SB 29, HB 73 and HB 183. He feels something should be done to cut the cost to residents and hopes one of these three bills will solve the problem.

Chairman Story called for opponents.

BRIEF IN SUPPORT OF REPEALER SB 170

This Brief is in support of Senate Bill 170 to repeal Chapter 440, Laws of 1981, now codified in 70-30-321 and 70-30-322, Montana Code Annotated.

I.

Statutes to be Repealed

1. 70-30-321, MCA:

Sale of property acquired for public use when use abandoned - procedure. (1) Whenever a person who has acquired a real property interest for a public use, whether by right of eminent domain or otherwise, abandons such public use and places such interest for sale, the seller may sell the interest to the highest bidder at public auction.

(2) In the event the seller decides to sell an interest in real property as set forth in subsection (1), he shall publish notice of public sale in a newspaper in the county in which the real property interest is located once a week for four successive weeks. Sale shall be held in the county where the real property interest is located. The notice of sale shall contain the information required by 77-2-322.

2. Legislative History:

Enacted under Section 1, Chapter 440, Laws of 1981; now codified in 70-30-321, Montana Code Annotated.

3. 70-30-322, M.C.A.

Option of original owner or successor in interest to purchase at sale price. (1) The owner from whom the real property interest was originally acquired by eminent domain or otherwise or, if there is a successor in interest, the successor in interest shall have the option to purchase the interest by offering therefor an amount of money equal to the highest bid received for the interest in the sale provided for in 70-30-321. If more than one person claims an equal entitlement, the option may not be exercised.

(2) If no bids are received by the seller and the optionholder indicates in writing to the seller that he wishes to exercise the option, the seller shall have the real property interest appraised and sell the interest at that price to the optionholder.

4. Legislative History:

Enacted under Section 2, Chapter 440, Laws of 1981, now codified in 70-30-322, Montana Code Annotated.

5. Compiler's comments state that Section 3, Chapter 440, Laws of 1981 provided that Sections 1 and 2 are intended to be codified as an integral part of Title 70, Chapter 30, which is the law of eminent domain, and the provisions of Title 70, Chapter 30, the law of eminent domain apply to Sections 1 and 2 of the above-cited statutes.

II.

Why These Statutes Must Be Repealed

The above-cited statutes are the result of special interest litigation and operate to the exclusive benefit of large corporations and public bodies such as The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Burlington Northern Railroad Company, The Montana Power Company, The Mountain States Telephone and Telegraph Company, The Montana State Highway Commission, and others who have acquired private Montana property by eminent domain or otherwise. The statutes are unconstitutional because they are clearly ex post facto legislation which ought not affect existing real property interests which previously have been acquired by eminent domain or

otherwise for public use to date. They ought to apply prospectively only for interests acquired after the date of the statutes' enactments. Otherwise, application of these statutes to existing real property interests which have been acquired by eminent domain or otherwise would result in unconstitutional takings of private Montana property without due process of law. Under common law, when the public purpose is abandoned for which the condemnor previously acquired a real property interest, the real property interest must revert to the condemnee or the condemnee's successors in interest by simple operation of law. These statutes completely abrogate that valuable common law right.

III.

Reversion of Condemned Property When Public Purpose is Abandoned

It is common law of England, and, therefore, common law of the majority of the states of the United States, that condemnation for railroad purposes or other public purposes vests in the condemning authority only a permanent easement for the public purpose during the continuance of the corporate or public body's existence, and if the corporation or public body abandons use of the property for the public purpose, the original owners of the property or their successors are entitled to take possession of the property. See City of Duggan v. Dennerd, 156 S.E. 315 (1930); Erie Lackawanna Railroad Co. v. State, 330 N.Y.2d 700, 38 A2. 463 (1972).

There are no Montana cases directly on point involving abandonment of railroad rights-of-way or other such rights-of-way which have been acquired by condemnation by any corporate or public body.

Nevertheless, the clear authority under common law in Arkansas, Georgia, Missouri, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Oklahoma, Tennessee, Washington, West Virginia, and Kansas support the proposition that any property acquired under condemnation or threat of condemnation, when abandoned of the purpose under which the condemnation powers were exercised, reverts to the original owners or owners' successors in interest in fee.

An excellent synopsis of the common law appears in Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208 (1905), where the Court held:

"An instrument which is in form of general warranty deed conveying a strip of land to a railroad company for a right of way will not vest an absolute title in the railroad company, but the interest conveyed is limited to the use for which the land is acquired, and when that use is abandoned the property will revert to the adjoining owner."

The Court further held that although the deed contained covenants of warranty and although the interest conveyed thereby was designated as a fee, those factors were not relevant nor were they controlling. The facts that the railroad acquired property for a public purpose and later abandoned the public purpose were the crucial facts which triggered the common law reversion. See also Harvest Queen Mill and Elevator Company v. John E. Sanders, et al., 159 Kan. 536, 370 P.2d 419 (1962).

In other words, when your property is taken under eminent domain for a public purpose, and the public purpose is later abandoned, you get your property back.

IV.

The Statutes Take From Private Montana Landowners and Give to Large Condemning Bodies

It is the law of Montana that statutes are read in derogation

of common law, but there is no common law in any case where the law is declared by statute. However, where law is not declared by statute, and the common law is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision. See 1-1-108 and 1-1-109, Montana Code Annotated.

The statutes sought to be repealed which deal with the sale of property acquired for public use when the public use is abandoned simply speak to "a real property interest for a public use." Obviously, "a real property interest" is extremely broad language which can be read to include all interests in real property, including easements. As our Supreme Court has held, an easement is a real property "interest protected by constitutional guarantees against the taking of private property without just compensation." City of Missoula v. Mix, 123 Mont. 365, 214 P.2d 212 (1980).

Further, 70-30-321, Montana Code Annotated provides that when any property acquired by public use whether by right of eminent domain or otherwise is abandoned, the condemnee or the condemnee's successor in interest may sell the interest to the highest bidder at public auction. A plain reading of that statute reveals that property acquired by a condemning authority apart from eminent domain may also be sold in like fashion. Thus, if one had granted or conveyed to a public body or corporation an easement for a public use freely or under threat of condemnation, the statute provides that the holder of that easement may sell the same at public auction, even though elementary common property law is clear that upon abandonment of an easement, title to the property servient to the easement reverts to the grantor or the grantor's successors in

interest. The law as provided under 70-30-321 and 70-30-322, Montana Code Annotated abrogates that elementary common property law and operates to the clear benefit of large corporations and public bodies who condemn property for public use in the State of Montana or acquire property under threat of eminent domain. Those statutes obviously deny the common law rights of property ownership to Montana property owners who have long been subject to the condemning authority of those large corporations and public bodies.

V.

Conclusion

The statutes at issue are the product of special interest legislation, and operate to the exclusive pecuniary benefit of large corporations, utilities, and public bodies who have exercised the power or threat of power, of eminent domain to acquire vast stretches of private Montana property. In these statutes, independent Montana landowners have been stripped of their common law property rights. The statutes operate to allow those large corporations, utilities and public bodies to sell property to the highest bidder; property which they don't really own to begin with because upon abandonment of the public purpose, the property reverts to the original owner or his successor in interest.

Mr. Chairman and members of the committee my name is Tim Stearns. I work on the staff of the Northern Plains Resource Council. NPRC is a 1500 member state wide agriculturally-based public interest group concerned about energy and resource development and its affects on agriculture.

SB 170 will allow landowners who have had property taken for a public use through condemnation to regain ownership of that property once the public use for which it was taken ends. This a tenent in law since English times.

The present statute was adopted in 1981 and I believe its intent was to allow a landowner to match the highest bid on property that was taken from him for a public use. The Highway Department sells property it no longer uses at auction; the intent was to give landowners the right of first refusal at those auctions.

It is our view that property taken through eminent domain should revert to the original landowner or his successor automatically at the conclusion of the public use. He should not be forced to match auction price to return that ground to production. Afterall he has farmed or ranched around the public use whether it be a road or transmission line etc.

NPRC would like to offer the following amendment to make clear how we feel the law should be interpreted.

New Section 70-30-321 If the use for which property is taken ends, the estate taken or the remainder of it reverts back to the person or his successor in interest from whom the property was taken.

Thank you for your consideration.

SENATE BILL 170

New Section 70-30-321

If the use for which property is taken ends, the estate taken or the remainder of it reverts back to the person or his successor in interest from whom the property was taken.

STATE ADMINISTRATION
February 4, 1983
Page 6

SENATOR MARBUT stated that he believed in a 13th member and suggested it automatically be the Lt. Governor.
SENATOR SO MOVED THAT THE LT. GOVERNOR BE THE 13th MEMBER.
MOTION FAILED, with two ayes and four nays.

SENATOR TVEIT remarked that his is the only district that had nothing to complain about, but that regardless, republicans and democrates alike are complaining.

SENATOR MARBUT stated that the Commission did a bad job and that the 4 year term was even forgotten.

SENATOR TOWE MOVED THAT S.B.286 DO NOT PASS.

SENATOR MARBUT MADE A SUBSTITUTE MOTION THAT S.B.286 DO PASS.
AS AMENDED. Roll call vote is shown as EXHIBIT 8. Voting yes were Senators Hammond, Marbut, Tveit and Story. Voting no were Senators Manning and Towe. Senator Stimatz, absent.
MOTION PASSED.

ACTION ON SENATE BILL NO. 311.

SENATOR TOWE MOVED THE FOLLOWING AMENDMENTS: To Strike: page 1, line 25; and page 2, line 1, in their entirety; and Insert "(7) office of the commissioner of political practices. Change the effective date. Add: of Senate Bill No. 137, following "approval" on page 2, line 7.

MOTION PASSED.

SENATOR TOWE MOVED THAT SENATE BILL 311 DO PASS AS AMENDED.
MOTION PASSED. It was asked to hold this bill until tuesday, February 8th.

ACTION ON SENATE BILL 170.

Amendments to this bill were passed out and are shown as EXHIBIT 9.

SENATOR MARBUT explained the amendments by stating to the committee that this bill attempted to undue action taken last session. Senator Manning and others submitted a bill to allow for the return of property which was taken for a particular purpose by a quasi or public agency back to the owner after they were through using it. It was a good bill but then it got worked over. Senator Boylan came in and asked to resurrect the bill and the amendments are provided to keep from happening, what happened in the last session. We hope that this will have effect on all property which is taken through condemnation proceedings for public use and

not just the railroad. He said that the way he has done this makes it kind of a ranchers bill. He suggested using the language as Dave Cogley has shown in Exhibit 9.

DAVE COGLEY said that the way this amendment is written now will clear up and do as they intended it to do in section 1 and 2. Section 3 is something new added "fee simple interest".

SENATOR TOWE asked if they thought it might be a little risky in section 4 by using the language "or otherwise" after eminent domain.

SENATOR MARBUT said that the reason he supports this is because when land is taken, other than fee simple, talking about easement, and when a organization acquires an easement, they take it for a particular purpose not to be their property..but that they have a right to do something on your property, but they take that and use it as a lever to go through the entire area.

MOTION was made by SENATOR MARBUT to take out "or otherwise" from section 4.

SENATOR MARBUT MOVED THE ADOPTION OF ALL THE AMENDMENTS TO S.B.170.

MOTION PASSED.

SENATOR MARBUT MOVED THAT SENATE BILL 170 DO PASS AS AMENDED.
MOTION PASSED UNANIMOUSLY.

ACTION ON SENATE BILL 211:

SENATOR TOWE MOVED SENATE BILL 211 DO NOT PASS.
MOTION PASSED with Senator Manning voting no.

ACTION ON SENATE BILL 269:

Discussion was held on this bill. Amendments were presented as EXHIBIT 10. Dave Cogley stated that these amendments were presented by the lobbyist for Montana Dakota Utilities and the last one is a title correction. The Public Service Commissioner disagrees with these amendments.

SENATOR TOWE MOVED THAT AMENDMENTS 3,5 & 6 as shown in Exhibit 10 and change the title DO PASS.

MOTION PASSED

FEBRUARY

MR. PRESIDENT

We, your committee on STATE ADMINISTRATION

having had under consideration SENATE Bill No. 170

Respectfully report as follows: That SENATE Bill No. 170

introduced bill, be amended as follows:

1. Title, line 4.
Strike: "ELIMINATING"
Insert: "TO PROVIDE FOR REVERSION TO THE FORMER
OWNER OF CERTAIN INTERESTS IN REAL PROPERTY ACQUIRED
FOR A PUBLIC USE AND LATER ABANDONED; LIMITING"
2. Title, line 5.
Following: "OWNER"
Strike: "OF A REAL PROPERTY INTEREST ACQUIRED FOR A
PUBLIC USE AND LATER ABANDONED; REPEALING"
Insert: "TO PURCHASE CERTAIN ABANDONED INTERESTS;
AMENDING"
3. Page 1.
Following: line 9
Strike: Section 1 in its entirety
Insert: "Section 1. Section 70-30-321, MCA,
is amended to read:

~~BOXRASSX~~

CONTINUED...

if

February 4, 1983 19

"70-30-321. Sale of property acquired for public use when use abandoned -- procedure. (1) Whenever a person who has acquired a ~~real-property~~ fee simple interest in real property for a public use, ~~whether other than~~ by right of eminent domain ~~or otherwise~~, abandons such public use and places such interest for sale, the seller may sell the interest to the highest bidder at public auction.

(2) In the event the seller decides to sell an interest in real property as set forth in subsection (1), he shall publish notice of the public sale in a newspaper published in the county in which the real property interest is located once a week for 4 successive weeks. Sale shall be held in the county where the real property interest is located. The notice of sale shall contain the information required by 77-2-322."

Section 2. Section 70-30-322, MCA, is amended to read:

"70-30-322. Option of original owner or successor in interest to purchase at sale price. (1) The owner from whom the real property interest described in 70-30-321 was originally acquired ~~by eminent domain or otherwise~~ or, if there is a successor in interest, the successor in interest shall have the option to purchase the interest by offering therefor an amount of money equal to the highest bid received for the interest at a sale provided for in 70-30-321. If more than one person claims an equal entitlement, the option may not be exercised.

(2) If no bids are received by the seller and the optionholder indicates in writing to the seller that he wishes to exercise the option, the seller shall have the real property interest appraised and sell the interest at that price to the optionholder."

Section 3. Reversion of fee interest. When property, in which a fee simple interest has been acquired by right of eminent domain, is abandoned or the purpose for which it was acquired is terminated, the property reverts to the original owner or his successor in interest.

Section 4. Reversion of less than fee interest. When an interest other than a fee simple interest in property, which has been acquired for a public purpose by right of eminent domain, is abandoned or the purpose for which it was acquired is terminated, the property reverts to the original owner or his successor in interest."

AND AS AMENDED

DO PASS

STATUS SHEET

HOUSE JUDICIARY COMMITTEE

48TH Legislature

Bill No.	Subject Matter	Date In	Sponsor	Hearing Date	Committee Action	Date Out
SB 142	Sec. of State, tax liens, deleting requirement that released federal tax liens not be removed from SS files	1/29/83	Sen. Gage	3/2/83	Table	3/8/83
SB 145	Montana State Bar, repealing fee for examination for admission	2/29/83	Sen. Turnage	3/8/83	Table	3/8/83
SB 168	Montana Youth Court Act, revising 6-month commitment to Dept. of Institutions and process	2/11/83	Sen. Van Valkenburg	3/4/83	Be Concurred In	3/4/83
SB 170	To provide for reversion to the former owner of certain interests in real property acquired for public use and later abandoned	2/28/83	Sen. Boylan	3/9/83	Table Be Concurred In As Amended	3/9/83 3/14/83
SB 177	To provide that income of a judgment debtor necessary for the support of his family is exempt from execution to satisfy, etc.	2/14/83	Sen. Van Valkenburg	3/4/83	Be Concurred In As Amended	3/4/83
SB 194	Jurys, generally amending and clarifying laws relating to selection; eliminating ballot capsules; specifying duties, etc	2/9/83	Sen. Aklestad	3/16/83	Be Concurred In	3/22/83

Judiciary Committee
March 9, 1983
Page Two

There were no further proponents and no opponents.

SENATOR CRIPPEN closed.

REPRESENTATIVE SPAETH asked when they are talking about youth in custody are they talking about youth in jail. MR. RACICOT replied that they are normally in a proper youth facility but some may be in custody in a jail.

REPRESENTATIVE SPAETH said that he wondered if the amendment would make it a little more open-ended as the law the way it is presently written assures that the county attorneys act as quickly as possible when the youth is in custody or jail. MR. RACICOT replied that there is that possibility if the youth court is not following the very specific guidelines of the Youth Court Act and there is the possibility that someone could remain in custody longer than what they do now. He felt the advantages outweigh the possible hazards of allowing the youth to be held in custody longer than he should be.

REPRESENTATIVE SPAETH asked about amending part 1 to 25 days instead of amending part 2. MR. RACICOT responded that they felt the threshold requirement should be 15 days and unless they can show compelling circumstances, this is where it should be.

There were no further questions and the hearing on this bill was closed.

SENATE BILL 170

SENATOR BOYLAN, District 38, said that this was originally introduced as a plain old repealer and State Administration Committee tried to fix this up and the more they fixed it up, the more in opposition they got; and he thought that they may come back to the plain old repealer. This is an act to provide for reversion to the former owner of certain interests in real property acquired for a public use and later abandoned limiting the right of first refusal of the former owner to purchase certain abandoned interests.

Judiciary Committee
March 9, 1983
Page Three

JAMES MORROW, an attorney from Bozeman, presented to the committee a packet of letters that were sent to Senator Boylan from himself and a brief in support of a repealer to SB 170. See EXHIBITS A, B, and C.

PAT UNDERWOOD, representing the Montana Farm Bureau, gave a statement in support of this bill. See EXHIBIT D.

TIM STEARNS, representing the Northern Plains Resource Council, said that this bill as introduced would allow a landowner who had his property taken from him through condemnation to regain ownership of that property once the public use for which it was taken ends. He stated that it is their belief that property taken by right of eminent domain should revert to the original owner or to his successors.

There were no further proponents and no opponents.

SENATOR BOYLAN said that with the abandonment of the Milwaukee Railroad there is a lot of land to be divided and the Burlington-Northern is abandoning a lot of branch lines and he felt that it was vital that they take care of this by the repealer.

REPRESENTATIVE KEYSER asked if they would like this committee to restore this to the original language that was there before the Senate tinkered with it. SENATOR BOYLAN replied yes.

REPRESENTATIVE SPAETH asked if they were not to return it to the original form would he prefer that they kill it. SENATOR BOYLAN said that he would prefer they kill what is there and what it says now changes the whole picture.

REPRESENTATIVE SPAETH asked if the new section on page 3 does not add a new dimension. MR. STEARNS replied yes. SENATOR BOYLAN said that you are better off to kill what is on the books and then let the Montana courts decide.

REPRESENTATIVE RAMIREZ said that what they are doing here is attempting to codify what they hope the law will be hereafter and not necessarily changing the status quo or anything that has gone on before or anything that

Judiciary Committee
March 9, 1983
Page Four

pertains to land that has already been acquired by condemnation. SENATOR BOYLAN replied that you change the theory - the common law theory is that it reverts and he does not feel that the intent of the legislature is properly expressed. He did not feel that they want to change the rights of the owner of the land and this bill already has. He commented that what we do here or say here, other counsel might say this is the intent of the legislature.

REPRESENTATIVE RAMIREZ stated that they have talked a lot about railroad abandonment, but whatever ownership is acquired when those lands were originally condemned, the supreme court is going to have to make a determination for all the land that was acquired prior to 1981. He said that in all probability those property rights were fixed at the time and they are not going to be taken away by an act that was adopted in 1981. He continued that what they are doing is saying that anything that is condemned or acquired in the future that this is the law that is going to apply to that condemnation. Then, he stated, if that land is abandoned it will revert to the landowner from whom it was acquired. MR. MORROW responded that the amendment does not say for prospective use only. He indicated that there are fourteen states that he knows of that says regardless of the form of the deed that this is still an easement and the reversionary rule does apply.

REPRESENTATIVE RAMIREZ asked if there was any case that was being litigated concerning the applicability of the 1981 law. DOUG HARRIS, representing the Montana Farm Bureau, responded that they couldn't find anything and they looked at it pretty carefully. He continued that in Montana wherein a private corporation can condemn private property for public use, it seems to him that it is critical that such a statute be passed; because companies generally acquire rights of way through a whole parcel of deeds, so they may have 1,000 to 1,500 deeds. He noted that the Milwaukee Road runs all the way from North Dakota to St. Regis, Montana and he would guess that there are 5 to 6,000 deeds. He felt that the impact on the past can only be judged on a case-by-case basis.

V

Judiciary Committee
March 9, 1983
Page Five

There were no further questions and the hearing on this bill was closed.

SENATE BILL 195

SENATOR CRIPPEN, District 33, Billings, said that this was an act that defined "hashish" for purposes of the controlled substances laws. He stated that section 50-32-101 defines various controlled substances and on pages 3 and 4, prior to this bill, there was no definition of the term "hashish". He stated that there was a case wherein the defendant was charged with the possession of hashish; the lower court dismissed the charge since the term "hashish" was not defined in the code, it could not be alleged in the complaint.

MARC RACICOT, Prosecution Coordinator for the County Prosecutor Services, of the Department of Justice, said that the definition comes from the Montana State Crime Lab and they are confident that they have given them a reasonable definition.

CHUCK O'REILLY, Sheriff of Lewis and Clark County and representing the Montana Sheriffs' and Peace Officers' Association, testified that they support this bill.

There were no further proponents and no opponents.

SENATOR CRIPPEN closed.

REPRESENTATIVE ADDY said in looking on page 4, at the bottom of the page, they defined "marijuana" and he thought that hashish could be included in this definition. MR. RACICOT said he thought he was correct, but there are different penalties for hashish and marijuana.

CHAIRMAN BROWN asked what are the penalties. MR. RACICOT replied that from one gram to sixty grams or less is a misdemeanor while over one gram of hashish is a felony.

There were no further questions and the hearing on this bill was closed.

Judiciary Committee
March 9, 1983
Page Fourteen

The motion carried unanimously.

SENATE BILL 236

REPRESENTATIVE KEYSER moved that this bill BE CONCURRED IN. The motion was seconded by REPRESENTATIVE EUDAILY.

CHAIRMAN BROWN pointed out that Senator Regan sent a note and was very disturbed about the police force getting rich.

The motion carried with REPRESENTATIVE FARRIS voting no.

SENATE BILL 170

REPRESENTATIVE ADDY moved that the bill BE CONCURRED IN. REPRESENTATIVE SEIFERT seconded the motion.

REPRESENTATIVE ADDY moved that the bill be amended on page 1, line 15, by striking this section and all subsequent sections and reinsert the language on lines 13 and 14 on page 1, and the title changed appropriately. REPRESENTATIVE SEIFERT seconded the motion.

REPRESENTATIVE SPAETH stated that he would like to speak against the motion as he felt that the Senate did something good here. He explained that the way the bill is written when you have fee simple property that is condemned or acquired some way in the past by condemnation, they said that the owner would have the opportunity to buy that property back. He stated that they also felt that if it was something less than fee simple title, i.e. an easement, that when the public use was no longer needed, that that would be given back to the present holder of that property. He indicated that he thought there was a fairness question and the Senate directly addressed that question; that when a person comes along and condemns a right-of-way easement, that they have benefited and they have received compensation for that right-of-way easement and now they want it back for free. He contended that it may have caused them an undue burden, but they got compensated and hopefully our condemnation laws are written so that they were adequately compensated. He

Judiciary Committee
March 9, 1983
Page Fifteen

did not feel that they should give it back to them free. He informed the committee that they have a ranch and they could profit from this particular bill; they have easements but they were adequately compensated for those easements and he did not feel that they should get it back for free. He felt that the Senate did a very good job of addressing this situation.

REPRESENTATIVE SCHYE said that he was a little confused; if he had forty acres and the railroad comes through and takes five acres on the corner; for years he has to go back and forth across this railroad track; the railroad is now going to abandon this; and he wondered what that would have to do with this bill. He asked if this repealer would just automatically give that land back or would they have to pay back the compensation they had.

REPRESENTATIVE ADDY noted that according to the briefs that Mr. Morrow presented on pages 3 and 4, he pointed out that the common law indicates that once the public purpose is no longer served by the condemnation, the property reverts to the prior property owner. He thought that this bill was introduced last time when the Burlington-Northern acquired the Milwaukee Road as the timing was certainly coincidental. He felt that when you are talking about eminent domain; you are really talking about an involuntary surrender of property rights by the original landowner and the only argument is what is just compensation. He said he liked the original intent of the bill because it encourages those who would claim a public use and take property to take the least interest that is actually necessary. He felt that this would tend to minimize the impact on the landowner of the industrialization of Montana. He contended that there is no doubt that changes are going to occur, and when you have rapid change, he would like to provide some cushion for those most directly affected by it.

REPRESENTATIVE SCHYE stated that they went through this on the northern borders on condemnation of land

Judiciary Committee
March 9, 1983
Page Sixteen

for the underground pipelines; it is underground, but they still farm the land on top of it but they still, by eminent domain, have the land and he asked if they were saying that if that land was abandoned, then someone else could come in and get that land that is on top of that pipe. REPRESENTATIVE ADDY replied that as the bill is amended, you would have the right of first refusal.-someone else could come in and bid.

REPRESENTATIVE SPAETH said that he would have to disagree with REPRESENTATIVE ADDY because most everything on the northern border relating to these pipelines are easements as opposed to fee simple and this bill, as the Senate amended it, lets all easements revert back for free and he felt that that was good for the present owner. He contended that the way the Senate amended it was if you acquired a fee simple, then the owner has the right of first refusal; he does not get it for free but he has to buy it.

REPRESENTATIVE ADDY said that he would like the condemning party to take less than fee simple if that is all that is necessary, and he would think that there would be less impact on the landowner if they appropriate less than fee simple interest in the property. He asserted that he wanted them to use the easement and if you allow them to sell a fee simple but not an easement, you are going to encourage them to go for a perpetual interest in the property.

REPRESENTATIVE RAMIREZ responded that he did not agree with that either because they are acquired for the least price too. He stated that they could not have built that pipeline if they had taken a fee simple interest in a strip of land - they couldn't have afforded it and certainly a pipe line company is not going to try to get a fee simple interest when an easement will accomplish every purpose they need to at much less cost because if they condemn an easement there is a lot less cost involved than if they condemn a fee simple strip across the property. He felt that economics enters into this in a big way and he

did not think that this bill is going to be the determining factor - what he thought was going to be the determining factor is what is the interest they need and what are they willing to pay for it in order to accomplish their purposes. He stated that if they can get by for less, they are going to pay for less.

REPRESENTATIVE ADDY explained that when you look at costs, you have to look at the upfront cost on one hand and then you have to look at the cost of fee simple or perpetual interest in the land less the potential resale value at the end of the project. He felt that as long as they have the probability of reselling this property, maybe for exactly what they paid for it, then there is going to be a lesser long-term cost and an incentive for them to take more of a permanent interest in the property.

REPRESENTATIVE RAMIREZ responded that a strip of land twenty feet wide is not the kind of thing that most companies want to invest in.

REPRESENTATIVE ADDY responded that if they are talking about pipelines, he would agree with him, but they are talking about any public purposes.

REPRESENTATIVE FARRIS said that the railroad in Fort Benton always refused to rebuild the bridge so that the road could be two lanes and if the railroad was not a railroad anymore, she assumed that this land would revert to the state, and she asked what would happen here under this bill and the amendments.

REPRESENTATIVE SPAETH responded that this is a past thing and he did not think this bill would apply to anything dealing with this type of thing and he stated that this generally applies to future condemnations; but he felt that one of the things that will apply to the prospective future is that lots of times they build roads along railroad beds and if that had been the case, that would revert back to the original owner as opposed to allowing the highway department or the county highway department to come in and buy that.

Judiciary Committee
March 9, 1983
Page Eighteen

REPRESENTATIVE FARRIS asked if the highway department could buy that land from the original owner. REPRESENTATIVE SPAETH replied that the highway department could do this, but it would be better for them to buy it from the railroad.

REPRESENTATIVE ADDY asked why would it be better to have them buy it from the railroad. REPRESENTATIVE SPAETH responded that you would be dealing with two transactions as opposed to one.

REPRESENTATIVE ADDY commented that under the bill as written, the landowner would have the right of first refusal; the highway department would come in and offer to buy from the railroad and the landowner would have the right of first refusal on that. He stated that if they go with the strict repealer, the land would automatically revert to the landowner and the person who originally gave up that land would have an interest that they could protect in the second condemnation proceedings. He declared that what REPRESENTATIVE SPAETH is saying is that this bill will piggyback eminent domain proceedings and more or less cut the original landowner out of any subsequent proceedings unless they can cough up the cash at that point in time. •

REPRESENTATIVE RAMIREZ asserted that he felt that everything they do today and everything that was done in 1981 is only going to operate in the future; that they cannot affect property rights that have already vested simply by changing the law. He stated that he likes the law in this bill as it is written to apply to the future and he wondered if they should put in a clause that says this will be prospective only - that would satisfy Mr. Morrow's concern that he did not want any of this law to be used in a dispute that had arisen before the law was enacted; and yet it would set the rules a little more clearly for anything that comes hereafter. He felt that this might be

Judiciary Committee
March 9, 1983
Page Nineteen

one way to handle it other than just repealing the 1981 law and leaving it up to the supreme court to decide what the rules are forever. He made a substitute motion that they add a clause that basically says this has a prospective operation. REPRESENTATIVE SPAETH seconded the motion.

REPRESENTATIVE ADDY asked if you are voting for your amendment, you are going against the original language in the bill. REPRESENTATIVE RAMIREZ replied that they would take the Senate version as amended but we would make it clear that this applies only in the future and does not affect anything in the past. He stated then they would leave it up to the courts to decide what the law is that applies to any condemnation and subsequent abandonment that occurred prior to 1981.

REPRESENTATIVE ADDY said that he opposed the motion and he felt that Mr. Morrow's point in letting the courts decide is that the courts won't have a statute in light of which the common law will be intermixed rather than having a statute abrogating common law and limiting discretion of the courts.

REPRESENTATIVE KEYSER said that he would have to speak against this amendment; he would like to go back to Senator Boylan's original bill, which was this little white bill here (he held up the first reading copy of SB 170) as he introduced it. He indicated that he would like to take the language out of the blue bill that the committee has before them and on page 3, section 3, the new section, include that and add that to this white bill and then go with it. He commented that if they can't go back to the original bill, although they would agree to that new section, then they would just as soon have this amended bill totally killed. He noted that that was the intent of the author, that is basically what the testimony was and, for that reason, he would oppose the Ramirez amendment.

REPRESENTATIVE SPAETH said that the sponsor felt that they should leave section 3 in there, but he felt that they should not do this without changing sections 1 and 2 as the Senate did. He thought that the crux of the bill as it is now written is found on page 3, section 3, but he did not think this could stand without the amendments that were made to section 70-30-321 and section 70-30-322. He commented that he felt the bill does something more than the present law does - it gives free reversion of easements - it doesn't give free reversion of fee simple property and he thought this was an important feature for a landowner. He said this was very critical to have as easements are more of a nuisance than fee simple right-of-way that goes through there. He advised that another problem is in condemning land as to when is this land going to revert back as a criteria in adjusting compensation. He felt that as a lawyer defending and prosecuting condemnations, this would be a new cause to expand the trial and he could see some problems in that too. He stated that he would support the Ramirez amendment.

REPRESENTATIVE ADDY declared that he thought the common law rule in Montana is perpetual interest less than fee interest do revert; that fee interest, under common law would also revert and what this bill intended to do originally was to make perpetual interest and less than perpetual interest revert so if they are stuck with the language in the original section 1, the straight repealer, that, in fact, would encompass section 3 on page 3 as well.

CHAIRMAN BROWN noted that the committee had considered a couple of bills that dealt with repealers and there had been some discussion about whether or not you could amend repealers.

REPRESENTATIVE KEYSER said he keeps hearing about eminent domain and that a person has a right to get this back if it was taken by eminent domain and as he reads through this whole bill with the Senate amendments, he does not see that, because they have crossed out every reference to eminent domain. He stated that everything in here talks about fee simple, but it does not address that property taken by eminent domain.

Judiciary Committee
March 9, 1983
Page Twenty-one

REPRESENTATIVE ADDY replied that he thought those are sections of the code that they are amending; title 7, section 30 is the eminent domain statute.

CHAIRMAN BROWN asked if this would conflict with the Jacobson bill. REPRESENTATIVE ADDY replied that he did not think it would; he did not recall anything in that bill that deals with reversion of interests.

REPRESENTATIVE CURTISS stated that she has real problems with a person who may have been an unwilling seller when a condemnation takes place and who would be wanting to get his property back but who would have to go through a competitive bid process. She thought she would be more comfortable if there was some provision that there would be an appraisal and she felt that there is a real sense of fairness involved here. She continued that she watched all the condemnation that took place during the building of the Libby dam - some 36,000 acres - and there were not any of those people who wanted to sell; many of them had homesteaded in this beautiful river valley and these had been their homes for ages; and because of escalated land values, it would not be within their ability to buy that back anyway, perhaps even at an appraised value rather than competitive bidding. She said that she did not know what the answer is.

REPRESENTATIVE RAMIREZ stated that with all these problems, maybe they should just kill the bill, but he felt that no matter what they do, it is prospective anyway and he felt they should amend it first and that would at least address a lot of concerns that Mr. Morrow had about whether this would interfere with any vested rights and any litigation that might arise over property that has already been condemned and already been abandoned. He said he would like to see them do this at least and then maybe they should kill the bill.

Judiciary Committee
March 9, 1983
Page Twenty-two

REPRESENTATIVE ADDY said that this is going to be prospective, but if they were going to return to the law pre-1981, it would not necessarily be prospective. He stated that they would have a two-year window in there and where the 1981 law operates, anything that occurred in that two-year period would fall under statutory provision and anything that happened before 1981 statute became effective or after the 1983 repealer went into effect would fall under common law principles, which gives the original landowner a little more protection. He explained that anytime a condemnor comes in and takes fee simple perpetual interest when they don't need that much, they are overreaching and to the extent that they discourage that and provide a bit of a windfall to the original landowner who has been deprived of the use of his property, has had to work around whatever is in the middle of his field or property, he felt that that is a just social policy.

REPRESENTATIVE RAMIREZ commented that there are two glaring assumptions in that statement that he does not know if they are accurate and that is (1) that the eminent domain statutes are abused or that they even can be abused by people taking more than they really need. He said that he was not sure that they could do this, because they have to show a public purpose and he did not think they could take more than they actually need. He asserted that the second assumption was that this brief contains the common law as it would be adopted by the Montana Supreme Court and he is not sure that that is the case either. He continued that he has been involved in enough of these controversies to know that you can sit down and read the plaintiff's brief and think there is no question about this; and then sit down and read the defendant's brief and then wonder how the plaintiff came up with all that stuff he came up with. He stated that they do not really know because there is no Montana decision on what the law is. He stated that

Judiciary Committee
March 9, 1983
Page Twenty-three

if they repeal the law rather than amend it, they will not know what the law is that pertains to anything after 1981 so we will just leave it totally up in the air and it would seem to him that is not the way to do it.

REPRESENTATIVE SCHYE commented that he is still confused, but he thought the landowners are now really becoming concerned about eminent domain. He said that he was never involved until this pipeline came in and you have no rights; and there is a lot of problems with the eminent domain laws. He thought a lot of people are getting interested in this because they are concerned about power lines, coal slurry lines and they are going to go through their prime farm lands and they do not have any choice.

CHAIRMAN BROWN suggested that maybe since there is such a diversity of opinion on this bill they should table it and think about it for awhile.

REPRESENTATIVE SPAETH moved that the bill BE TABLED. REPRESENTATIVE ADDY seconded the motion. The motion carried with REPRESENTATIVE KEYSER, REPRESENTATIVE SCHYE and REPRESENTATIVE DAILY voting no.

SENATE BILL 201

MS. DESMOND said that she spoke to Marc Racicot to see if he knew anything about a practical comparison between the two and he didn't and she went to the library and went back a couple years and didn't find anything.

REPRESENTATIVE ADDY said that the problem they have now is that one defendant can compel the state to grant immunity to another state defendant; the second defendant then has transactional immunity and cannot be tried for the crime. Then the second defendant gets on the stand and says that he did everything

MES H. MORROW, JR.
MUND P. SEDIVY, JR.

CHARLES STAMMER
COUNSEL
TRY SCHAPLOW
OF COUNSEL
UGLAS D. HARRIS
ADM. IN WASHINGTON STATE

LAW OFFICES

MORROW & SEDIVY
PROFESSIONAL CORPORATION
P.O. BOX 1168
BOZEMAN, MONTANA 59715

Exhibit A
SB170
3-9-83

LOCATION:
FIRST SECURITY BANK BUILDING
208 EAST MAIN
BOZEMAN, MONTANA 59715

TELEPHONE:
(406) 586-4311

February 28, 1983

Senator Paul Boylan
Montana State Capitol
Capitol Station Box 11
Helena, MT 59620

RE: Senate Bill No. 170

Dear Senator:

Thank you for your phone call last week from Helena and my phone conference with you last Saturday. You had sent to me the Amended Bill. As we have discussed, this is an "emasculat-ion". You had originally filed a straight forward repealer bill to repeal Section 70-30-221 and 322 of the M.C.A. This bill got into two or three different committees. The printed bill that you have now sent to me is simply a repeat of the same legisla-tion that was passed in 1981 under Chapter 440. There was some improvement in that there was added a Section 3 which provided for a reversion to adjoining property owners where the interest was other than a fee simple interest. You informed me that Senator Turnage would not agree to that Section 3 and that Sec-tion 3 was being eliminated.

In other words, all that the amendments have done is to have printed the same ideas that were in Chapter 440 of the 1981 Session laws.

The procedures now open appear to be as follows:

- 1) To have the bill amended in the House by restoring your original bill to a straight forward repealer.
- 2) To get the bill withdrawn as it is now written.
- 3) To have the House vote against the bill.

This possibly could be an argument that the 1983 voting against the proposal would, in effect, be stating its intent to have the 1981 legislation repealed.

If item 1, above, is a better strategy, I told you that I would take the time to appear before any committee of the House. I have further informed that I have no personal interest in the particular legislation. However, it may affect many landowners to whom the "public purpose" easement deeds apply. My original letter and briefing to you covers this subject.

February 28, 1983
Senator Paul Boylan
Page Two

I think an investigation should be had as to the real background of those who framed the 1981 legislation (Chapter 440, 1981 Session Laws), and those who prepared the particular amendments to your Senate Bill 170. It appears to me that a "bill of goods" has been sold by certain interest who have a beneficial interest. In this connection, I am particularly thinking of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company that has been inducing adjoining landowners to pay them for the abandoned Railroad Right-of-Way.

I am sending copies of this letter to the same persons that I have previously sent copies to and, in addition, I am sending copies of this letter together with copies of my letter and briefing to Fred Colver, Representative of Central Montana Association which is concerned with the Milwaukee branch line running from Harlowton to the Winifred area, and to Fred Horpestead, Representative of Tri-County Association which has been attempting to deal with the Milwaukee Railroad people on lands involved in Wheatland, Golden Valley, and Musselshell Counties.

After you have received this communication, I would appreciate phone conference with you.

Again, thanking you for your efforts in this matter, and with best personal regards, I remain

Very truly yours,

MORROW & SEDIVY, P. C.

J. H. Morrow

JHM:cf

cc: Mr. Pat Underwood	Mr. Lester Brainard
Mr. Mons Teigen	Mr. David T. Brewer
Mr. Terry Murphy	Mr. Berrien P. Anderson
Mr. Tim Stearns	Doig Brothers
Mrs. Louise Galt	Mr. Horace Morgan
Mr. Walter Sales	Mr. Knute Hereim
Mr. Norman Wallin	Mr. Paul Maddock
Mrs. Dorothy Eck	Mr. Jim Higgins
Mr. Leo Lane	Mr. Harry Brainard
Mr. Robert A. Ellerd	D. D. Davis Ranch
Mr. John Vincent	Mr. William H. Orton
Mr. Mac Quin	Mr. William P. Carr
Mr. Bill Brown	Mr. Richard J. Morgan
Mr. Fred Colver	Mr. Charles Lucas
Mr. Fred Horpestead	Mr. Russell Robinson

WES H. MORROW, JR.
MUND P. SEDIVY, JR.

CHARLES STAHMER
COUNSEL
RY SCHAPLOW
OF COUNSEL
DOUGLAS D. HARRIS
ADM. IN WASHINGTON STATE

LAW OFFICES
MORROW & SEDIVY
PROFESSIONAL CORPORATION
P.O. BOX 1168
BOZEMAN, MONTANA 59715

Exhibit B
SB170
3-9-83

LOCATION:
FIRST SECURITY BANK BUILDING
208 EAST MAIN
BOZEMAN, MONTANA 59715

TELEPHONE:
(406) 586-4311

January 21, 1983

Senator Paul Boylan
Montana State Capitol
Capitol Station Box 11
Helena, Montana 59620

RE: Senate Bill 170
To Repeal Chapter 440, 1981 Session Law
Being 70-30-321 and 322, M.C.A.

Dear Senator:

I am enclosing Brief in Support of the above-reference. I am also sending copies of this letter and the Brief to Pat Underwood of the Montana Farm Bureau, Mons Tiegen of the Montana Stockgrowers Association, Terry Murphy of the Montana Farmers Union, Tim Stearns of the Northern Plains Resources Council, and to attorney Louise R. Galt of Helena.

The effect of Chapter 440 of the 1981 Session was perhaps misunderstood. The right of eminent domain was originally a right of the state to take private property for public use. The original reasons were to provide for public buildings and grounds, highways, and the like. These public uses have been added to many times by legislative amendments as will be noted in Section 70-30-102, M.C.A. The State of Montana no longer is a required party. Under Section 70-30-203, M.C.A., any corporation, association, commission, or person may be named as a party plaintiff. The final order of condemnation must describe the property and the purposes of the condemnation. (Sec. 70-30-309 M.C.A.). It was well recognized law that upon abandonment of the purpose that the title to the land reverts to the adjoining property owner.

The law now provides for private corporations and persons to take property for any of the various purposes enumerated. The Milwaukee Railroad and previous private railroad corporations did go to court on condemnation proceedings back in the early 1900's. Its representatives were enabled to go to farmers and ranchers and in the towns and cities armed with deeds of

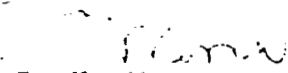
January 21, 1983
Senator Paul Boylan
Page Two

various kinds to obtain railroad rights-of-way. This was a selling scheme aided by outside investors and land speculators.

The repealer bill, S.B. 170, will restore to the adjoining landowner his right to the land when the "public" purpose has been abandoned without the necessity of paying to the railroad company or other corporation or private person any money. The act as it was passed in 1981 compels the adjoining landowner to pay money that he never had to pay before. This is wrong. Hopefully, the Brief will help.

Very truly yours,

MORROW & SEDIVY, P. C.


J. H. Morrow

JHM:cf

Enc.

cc: Mr. Pat Underwood
Mr. Mons Tiegen
Mr. Terry Murphy
Mr. Tim Stearns
Mrs. Louise Galt
Mr. Walter Sales
Mr. Norman Wallin
Mrs. Dorothy Eck
Mr. Leo Lane
Mr. Robert A. Ellerd
Mr. John Vincent
Mr. Mac Quinn
Mr. Bill Brown

Exhibit C
SB 170
3-9-83

BRIEF IN SUPPORT OF REPEALER SB 170

This Brief is in support of Senate Bill 170 to repeal Chapter 440, Laws of 1981, now codified in 70-30-321 and 70-30-322, Montana Code Annotated.

I.

Statutes to be Repealed

1. 70-30-321, MCA:

Sale of property acquired for public use when use abandoned - procedure. (1) Whenever a person who has acquired a real property interest for a public use, whether by right of eminent domain or otherwise, abandons such public use and places such interest for sale, the seller may sell the interest to the highest bidder at public auction.

(2) In the event the seller decides to sell an interest in real property as set forth in subsection (1), he shall publish notice of public sale in a newspaper in the county in which the real property interest is located once a week for four successive weeks. Sale shall be held in the county where the real property interest is located. The notice of sale shall contain the information required by 77-2-322.

2. Legislative History:

Enacted under Section 1, Chapter 440, Laws of 1981; now codified in 70-30-321, Montana Code Annotated.

3. 70-30-322, M.C.A.

Option of original owner or successor in interest to purchase at sale price. (1) The owner from whom the real property interest was originally acquired by eminent domain or otherwise or, if there is a successor in interest, the successor in interest shall have the option to purchase the interest by offering therefor an amount of money equal to the highest bid received for the interest in the sale provided for in 70-30-321. If more than one person claims an equal entitlement, the

(2) If no bids are received by the seller and the optionholder indicates in writing to the seller that he wishes to exercise the option, the seller shall have the real property interest appraised and sell the interest at that price to the optionholder.

4. Legislative History:

Enacted under Section 2, Chapter 440, Laws of 1981, now codified in 70-30-322, Montana Code Annotated.

5. Compiler's comments state that Section 3, Chapter 440, Laws of 1981 provided that Sections 1 and 2 are intended to be codified as an integral part of Title 70, Chapter 30, which is the law of eminent domain, and the provisions of Title 70, Chapter 30, the law of eminent domain apply to Sections 1 and 2 of the above-cited statutes.

II.

Why These Statutes Must Be Repealed

The above-cited statutes are the result of special interest litigation and operate to the exclusive benefit of large corporations and public bodies such as The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Burlington Northern Railroad Company, The Montana Power Company, The Mountain States Telephone and Telegraph Company, The Montana State Highway Commission, and others who have acquired private Montana property by eminent domain or otherwise. The statutes are unconstitutional because they are clearly ex post facto legislation which ought not affect existing real property interests which previously have been acquired by eminent domain or

otherwise for public use to date. They ought to apply prospectively only for interests acquired after the date of the statutes' enactments. Otherwise, application of these statutes to existing real property interests which have been acquired by eminent domain or otherwise would result in unconstitutional takings of private Montana property without due process of law. Under common law, when the public purpose is abandoned for which the condemnor previously acquired a real property interest, the real property interest must revert to the condemnee or the condemnee's successors in interest by simple operation of law. These statutes completely abrogate that valuable common law right.

III.

Reversion of Condemned Property When Public Purpose is Abandoned

It is common law of England, and, therefore, common law of the majority of the states of the United States, that condemnation for railroad purposes or other public purposes vests in the condemning authority only a permanent easement for the public purpose during the continuance of the corporate or public body's existence, and if the corporation or public body abandons use of the property for the public purpose, the original owners of the property or their successors are entitled to take possession of the property. See City of Duggan v. Dennerd, 156 S.E. 315 (1930); Erie Lackawanna Railroad Co. v. State, 330 N.Y.2d 700, 38 A2. 463 (1972).

There are no Montana cases directly on point involving abandonment of railroad rights-of-way or other such rights-of-way which have

Nevertheless, the clear authority under common law in Arkansas, Georgia, Missouri, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Oklahoma, Tennessee, Washington, West Virginia, and Kansas support the proposition that any property acquired under condemnation or threat of condemnation, when abandoned of the purpose under which the condemnation powers were exercised, reverts to the original owners or owners' successors in interest in fee.

An excellent synopsis of the common law appears in Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208 (1905), where the Court held:

"An instrument which is in form of general warranty deed conveying a strip of land to a railroad company for a right of way will not vest an absolute title in the railroad company, but the interest conveyed is limited to the use for which the land is acquired, and when that use is abandoned the property will revert to the adjoining owner."

The Court further held that although the deed contained covenants of warranty and although the interest conveyed thereby was designated as a fee, those factors were not relevant nor were they controlling. The facts that the railroad acquired property for a public purpose and later abandoned the public purpose were the crucial facts which triggered the common law reversion. See also Harvest Queen Mill and Elevator Company v. John E. Sanders, et al., 159 Kan. 536, 370 P.2d 419 (1962).

In other words, when your property is taken under eminent domain for a public purpose, and the public purpose is later abandoned, you get your property back.

IV.

The Statutes Take From Private Montana
Landowners and Give to Large Condemning Bodies

of common law, but there is no common law in any case where the law is declared by statute. However, where law is not declared by statute, and the common law is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision. See 1-1-108 and 1-1-109, Montana Code Annotated.

The statutes sought to be repealed which deal with the sale of property acquired for public use when the public use is abandoned simply speak to "a real property interest for a public use." Obviously, "a real property interest" is extremely broad language which can be read to include all interests in real property, including easements. As our Supreme Court has held, an easement is a real property "interest protected by constitutional guarantees against the taking of private property without just compensation." City of Missoula v. Mix, 123 Mont. 365, 214 P.2d 212 (1980).

Further, 70-30-321, Montana Code Annotated provides that when any property acquired by public use whether by right of eminent domain or otherwise is abandoned, the condemnee or the condemnee's successor in interest may sell the interest to the highest bidder at public auction. A plain reading of that statute reveals that property acquired by a condemning authority apart from eminent domain may also be sold in like fashion. Thus, if one had granted or conveyed to a public body or corporation an easement for a public use freely or under threat of condemnation, the statute provides that the holder of that easement may sell the same at public auction, even though elementary common property law is clear that upon abandonment of an easement, title to the property servient to the

interest. The law as provided under 70-30-321 and 70-30-322, Montana Code Annotated abrogates that elementary common property law and operates to the clear benefit of large corporations and public bodies who condemn property for public use in the State of Montana or acquire property under threat of eminent domain. Those statutes obviously deny the common law rights of property ownership to Montana property owners who have long been subject to the condemning authority of those large corporations and public bodies.

V.

Conclusion

The statutes at issue are the product of special interest legislation, and operate to the exclusive pecuniary benefit of large corporations, utilities, and public bodies who have exercised the power or threat of power, of eminent domain to acquire vast stretches of private Montana property. In these statutes, independent Montana landowners have been stripped of their common law property rights. The statutes operate to allow those large corporations, utilities and public bodies to sell property to the highest bidder; property which they don't really own to begin with because upon abandonment of the public purpose, the property reverts to the original owner or his successor in interest.

V
Judiciary Committee
March 14, 1983
Page Fourteen

REPRESENTATIVE SPAETH indicated that he has some problems with bills like this coming in very often.

REPRESENTATIVE RAMIREZ stated that title examiners can really be nit-pickers about these things; they find these defects and they create a whole lot of problems that are technical defects and this bill corrects this.

The motion carried with all voting aye with the exception of REPRESENTATIVE JENSEN.

SENATE BILL 114

CHAIRMAN BROWN said that he wanted to go over these amendments before they take action on the bill.

SENATE BILL 170

REPRESENTATIVE BERGENE moved that this bill BE TAKEN OFF THE TABLE. REPRESENTATIVE KEYSER seconded the motion. The motion carried unanimously.

REPRESENTATIVE BERGENE moved that this bill BE CONCURRED IN. REPRESENTATIVE KEYSER seconded the motion.

CHAIRMAN BROWN moved that they reinsert the repealer clause and retain new section 3. REPRESENTATIVE CURTISS seconded the motion.

REPRESENTATIVE HANNAH asked if what he is saying is that if someone comes in and through the power of eminent domain, take a right-of-way and if they are not using it, it reverts back to the owner exclusively and free of charge.

CHAIRMAN BROWN replied that it does what section 3 says, "When an interest other than a fee simple interest in property, which has been acquired for a public purpose by right of eminent domain, is abandoned or the purpose for which it was acquired is terminated, the property reverts to the original owner or his successor in interest."

REPRESENTATIVE RAMIREZ said that he would have to speak in opposition to the amendment as he did not think it would make it through the Senate if we put it back into its original form; it would go into conference committee or be killed; and he felt that they had an opportunity to clarify the law. He made a substitute motion to amend by adding a subsection

4, which says, "This law will be prospective only and applies to any property acquired here after." He felt that this would meet the objections of Mr. Morrow, who was the attorney who came in and testified on it, as he was concerned that this kind of bill would affect the reversion of property that was already condemned, primarily by the railroad. He explained that this property was acquired by condemnation years ago, it has since been abandoned; there may be lawsuits over it; and he did not want a law on the books that might affect what he thinks are the rules that might apply to that, which Representative Ramirez felt was already fixed by what the supreme court says the common law is. He contended that by making this in the future, we solve that problem, but yet we put some definite guidelines that he thought was very fair as to what people are acquiring in the future when they condemn for a public purpose.

CHAIRMAN BROWN asked if the language MS. DESMOND had worked out would be O.K: "Standard savings clause. This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act."

REPRESENTATIVE RAMIREZ replied that was alright with one exception as he thought they should say, "property that was acquired" as that is what they are talking about - property acquired prior to the effective date. He said that if you added that, he felt it would be alright.

The motion was seconded by REPRESENTATIVE IVERSON, who said that he agreed with this and explained that this bill came up last session primarily because of the Milwaukee abandonment; they did a lot of work on it last session trying to decide if there was a possibility of putting it together and one of the problems they ran into is that there is no clear way to identify it; sometimes they automatically reverted; sometimes the original owner of the land was very poorly identified and he thought this would create a multitude of lawsuits as it is too unclear - the original ownership and who it may have originally belonged to.

REPRESENTATIVE ADDY said that he would like to offer a compromise by amending on page 2, section 2, line 12, by saying, "the landowner shall have the option to purchase the interest by offering therefor an amount of money equal to the highest

bid received for the interest at a sale provided for in 70-30-321, or an amount equal to the price paid by the condemnor." He said that this way you would not really have a windfall to the landowner whose property was acquired or to the condemnor who is exercising eminent domain. He thought this would be a middle position between the two and one that would give the landowner safeguards that whoever comes in and condemns isn't just taking the property for limited period of time and it would encourage them to take less than fee simple interest.

REPRESENTATIVE SPAETH indicated that he would like to speak against this idea as he thought they had three options - (1) to go back to the bill in its original state, although he did not think the Senate would buy that; (2) they can leave it in its present state and make it prospective; and (3) the third option is Representative Addy's option and he did not think that this option would have any viability at all as he felt the Senate would reject it outright. He commented that their fourth option was to kill the bill. He continued that he thought there were some good parts to the bill - the amendment making it prospective and he would like to see it prospective rather than retroactive, but he would hate to see it repealed because it does give the landowner, at least in the future, the right of first refusal, which the present law does not and he felt that they should be happy with what they are getting here.

REPRESENTATIVE ADDY thought that this was being stated entirely in political and procedural terms; he felt that this was a fairer way to divide the baby and takes into consideration both the initial negative impact that the landowner suffers, the negative impact while this property has been under use and takes into consideration the investment that the condemnor has made in the property and he thought this would be fairer than what the committee is looking at now,

REPRESENTATIVE RAMIREZ requested that he state again what this does.

REPRESENTATIVE ADDY replied that the landowner has to buy the property back at fair market value and has to pay the same amount that a would-be buyer is willing to pay. He explained that he could buy it for that price or he could buy it for the price that it was bought from them for, whichever is less.

Judiciary Committee
March 14, 1983
Page Seventeen

REPRESENTATIVE RAMIREZ stated that he did not think this was in any way reasonable because there is no time limit. He continued that the landowner has had the money and the use of that money for all those years; and it does not take into account any improvement that might be on there or the fact that the landowner has had the use of the money. He suggested that if he gets \$10,000.00 for that property and with that money goes out and gets some other property and holds it for ten, twenty or thirty years, he has had the benefit of the appreciation that that money has given him. He declared that he is going to get this other property back for the original price and he did not feel that it was fair.

REPRESENTATIVE KEYSER exclaimed that, first of all, the guy did not want to sell his property to start with - he had no intention of selling and did not want to sell and the sale was forced upon him; the only way they thought they could do this in the name of justice was to put a price on it that they were going to give that landowner for his property; and if he gets it back at the same price, he felt that that was good and the guy who had it deserves it that way.

CHAIRMAN BROWN noted that this land is typically undervalued.

REPRESENTATIVE CURTISS commented that she supported Representative Addy's proposal; whatever amount the person gets in exchange for his property is not going to compensate in an instance where a landowner has to drive a mile down to be able to get across a track and then go back another mile to what may be the only spring on his property; and she felt that it did not seem fair to have to outbid the highest bidder to be able to get that back.

REPRESENTATIVE ADDY moved that the amendment be amended on page 2, line 13, following "to" insert, "either the amount of money for which the real property interest was originally acquired or". REPRESENTATIVE CURTISS seconded the motion.

REPRESENTATIVE HANNAH questioned if current language says that the landowner shall have the option to purchase the interest that he had.

Judiciary Committee
March 14, 1983
Page Eighteen

REPRESENTATIVE RAMIREZ said that he knew that people are concerned about the power of condemnation, but, he believes that, in this state, if you think that you have an anti-development climate in this state right now, you are adding to it; the public reaction to these things is that is the way it is in Montana; there would never be any of these things built; there would never be a transmission line; there would never be anything in the way of development of your natural resources if you did not have the power of condemnation. He felt that you substantially alter that power when you put on something like this. He contended that the Senate will never buy this, but he felt that they are creating tremendous problems for any kind of development of natural resources.

CHAIRMAN BROWN declared that he totally agreed with him in terms of eminent domain statutes and he felt it was imperative to maintain some reasonable semblance of the eminent domain statute, but here he does not see where this really affects that. He felt that all they are saying is that that landowner who was abused to begin with can get that property back at the same price as he had it before. He thought that there are going to be a few cases where it is going to amount to a windfall to the landowner but he felt that the bulk of the cases will be a return to the normal situation that existed prior to the eminent domain acquisition; and, in most cases, those acquisitions are a pain-in-the-neck; and he did not see where this was changing eminent domain.

REPRESENTATIVE SPAETH said they were adding a new factor and that is how long is that public use going to be in existence. He felt that this opens the court up to a whole new realm and he explained that most of the time when he is sitting there representing the landowner, he tried to get as much as he can get; when on the other side, he is trying to pay as little as can pay; and he felt that this was going to give him a little more ammunition when he is sitting on the other side of the table and dealing with the landowner, as he can give him a little less than he probably wants, because you may be giving this up in twenty or thirty years and many of those landowners are not going to be around twenty or thirty years from now, so the people

Judiciary Committee
March 14, 1983
Page Nineteen

that you are going to hurt more are the people sitting at that condemnation table and the one you will be helping is the person in the future that comes along and is a successor in interest generally through purchase. He said that is the reason he opposes it as it does not help the person whose property is being condemned.

REPRESENTATIVE CURTISS noted that the people who are willing to litigate and more knowledgeable are going to get a better deal, but she just watched a procedure whereby 36,000 acres were condemned; these individuals lacked the knowledge of legal process and were the ones who were hurt. She said that their families have the same regard for that land that was condemned as they do; and they actually watch people having to come in and stand on one foot and then another while they dealt with the Corp of Engineers concerning their lifetime accumulation. She felt this was a real injustice.

REPRESENTATIVE KEYSER moved to divide the amendments. CHAIRMAN BROWN responded that this is the amendment to the substitute. REPRESENTATIVE ADDY withdrew his amendment.

REPRESENTATIVE RAMIREZ withdrew his amendment because he would rather vote on Representative Addy's amendment.

REPRESENTATIVE ADDY made a substitute motion to consider his amendment.

REPRESENTATIVE IVERSON replied that he can't vote on this unless something like Representative Ramirez's amendment is on there that makes it prospective.

REPRESENTATIVE ADDY withdrew his amendment and offered Representative Ramirez's amendment. REPRESENTATIVE JENSEN seconded the motion. A vote was taken and all were in favor with the exception of REPRESENTATIVE KEYSER, who voted no.

REPRESENTATIVE ADDY moved that the previous amendment with the language "reverts back to the original owner at the price that was paid or to the highest bidder, whichever was lower." be adopted. REPRESENTATIVE CURTISS seconded the motion. The motion carried with REPRESENTATIVE RAMIREZ, REPRESENTATIVE EUDAILY, REPRESENTATIVE HANNAH, REPRESENTATIVE SPAETH, REPRESENTATIVE BERGENE and REPRESENTATIVE DAVE BROWN voting no.

Judiciary Committee
March 14, 1983
Page Twenty

REPRESENTATIVE JENSEN moved that the bill BE CONCURRED IN AS AMENDED. The motion was seconded by REPRESENTATIVE FARRIS.

REPRESENTATIVE RAMIREZ made a substitute motion that everything be stricken after line 15 and lines 13 and 14 be re-inserted. He said this would put it back in the form that the sponsor wanted, which was to insert the repealer and add section 3. REPRESENTATIVE SPAETH seconded the motion.

REPRESENTATIVE SCHYE asked if putting back in the repealer and putting in section 3, is this like Senator Boylan wanted it. REPRESENTATIVE KEYSER said just like the white bill with section 3 added.

REPRESENTATIVE RAMIREZ stated that this is a great way to try and please Senator Boylan and put it back as the sponsor intended.

REPRESENTATIVE ADDY said that he thought this was a good way to kill the bill. REPRESENTATIVE SPAETH said that he did not think Representative Ramirez made this motion to kill the bill and did not think this was in order.

REPRESENTATIVE KEYSER commented that in Senator Boylan's testimony and in Senator Boylan's attorney's testimony that that was what they wanted to do and he affirmed that if that could not be done, Senator Boylan would rather that the bill be killed - that is exactly what his testimony was. He felt that this is probably a very reasonable approach.

REPRESENTATIVE RAMIREZ indicated that this was his second choice and his third choice is how the bill is presently written and he just cannot support it. He stated that he can support it this way, but he would prefer it another way.

CHAIRMAN BROWN asked if they pass the bill in the form of my amendment and your amendment, won't it apply prospectively. REPRESENTATIVE RAMIREZ replied that he thought it would, but he would not mind adding a prospective clause on section 3.

REPRESENTATIVE JENSEN wondered if this was part of Senator Boylan's interest. CHAIRMAN BROWN replied that he did not think it was mentioned.

V

Judiciary Committee
March 14, 1983
Page Twenty-one

REPRESENTATIVE CURTISS questioned that as amended, it will apply only to easements and not deeded property. REPRESENTATIVE JENSEN responded that that is what new section 3 does; it will not affect the taking of real property.

A vote was taken and the motion carried with 13 voting yes and 5 voting no. See ROLL CALL VOTE.

REPRESENTATIVE KEYSER moved that the bill BE CONCURRED IN AS AMENDED. The motion was seconded by REPRESENTATIVE HANNAH. The motion carried with REPRESENTATIVE JENSEN and REPRESENTATIVE FARRIS voting no.

SENATE BILL 347

MS. DESMOND handed out copies of HB 888 and copies of the case Oates vs. Knutson. See EXHIBIT F. She stated that in section 6 of SB 347, the reference to prescriptive easement was deleted and they felt that it wasn't necessary to define it as it is already defined in case law; then in HB 888, they have inserted in subsection 2, line 18, language stating "for navigation upon a stream, river, or lake". She said that she did not think that was in conflict with SB 347, but just more restrictive. She indicated that they added on page 5, line 22, the language, "or occurred without objection but with the knowledge of the landowner or his agent." and she said this is to cover the situations where people are using the landowner's land; but he has not given them express permission to do this.

REPRESENTATIVE SPAETH moved that SB 347 BE CONCURRED IN. The motion was seconded by REPRESENTATIVE ADDY.

REPRESENTATIVE RAMIREZ said that he thought HB 888 is in trouble; he did not think it is likely to pass; and he felt this was important as to how we handle this bill. He also felt that the change in HB 888 does give away a little of something by the sportsman to the landowner, but he said they were in an area where he does not know if the courts have even considered a prescriptive easement for floating a stream. He contended that if the sportsman gets something in HB 888, he gets the right to float that stream. He said he would hate to see them pass one side of the compromise and not the other. He also felt that this bill is giving

March 14, 1982

MR. SPENCER:We, your committee on JUDICIARYhaving had under consideration SENATEBill No. 170third reading copy (blue)
color

A BILL FOR AN ACT ENTITLED: "AN ACT ELIMINATING TO PROVIDE FOR REVERSION TO THE FORMER OWNER OF CERTAIN INTERESTS IN REAL PROPERTY ACQUIRED FOR A PUBLIC USE AND LATER ABANDONED; LIMITING THE RIGHT OF FIRST REFUSAL OF THE FORMER OWNER OF A REAL PROPERTY INTEREST ACQUIRED FOR A PUBLIC USE AND LATER ABANDONED; REPEALING TO PURCHASE CERTAIN ABANDONED INTERESTS; AMENDING SECTIONS 70-30-321 AND 70-30-322, MCA."

Respectfully report as follows: That SENATE Bill No. 170

BE AMENDED AS FOLLOWS:

1. Title, line 7.

Strike: "LIMITING"

Insert: "ELIMINATING"

2. Title, line 9.

Strike: "TO PURCHASE CERTAIN ABANDONED INTERESTS; AMENDING"Insert: "OF A REAL PROPERTY INTEREST ACQUIRED FOR A PUBLIC USE AND LATER ABANDONED; REPEALING"

B67X86

March 14, 1983

3. Page 1, line 15.

Strike: Sections 1 and 2 in their entirety.

Insert: Section 1. Repealer. Sections 70-30-321 and 70-30-322,
HCA, are repealed."

Renumber subsequent sections.

AND AS AMENDED
BE CONCURRED IN